Rejections under 35 U.S.C. § 102

Claims 20, 21 39, and 41 stand rejected for anticipation by Ansimov. This rejection is traversed. As stated in M.P.E.P. § 2131.01, "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference" (citations omitted; emphasis added). While recognizing that the instant claims are not explicitly anticipated by the cited art, the Office bases the rejection on inherency. Regarding inherency, M.P.E.P. § 2112 states:

> "To establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) (emphasis added).

Applying this standard to the present case, Ansimov does not inherently anticipate any of the instant claims.

Claim 20, from which claim 21 depends, is directed to a method for alcoholic fermentation, requiring "a fermentation micro-organism" and "at least one mineral-rich or mineral-enriched yeast." Furthermore, claim 20 requires that the "mineral-rich or mineral-enriched yeast provides a nutrient source for said fermentation." Nowhere does Ansimov teach or inherently employ such a method.

The abstract of Ansimov discloses only the production of a beer yeast. Assuming arguendo that the yeast of Ansimov is a mineral-rich or mineral-

enriched yeast (which Applicant does not concede), Ansimov does not provide any alcoholic fermentation, as required by claim 20. In addition, the instant claims require two organisms and Ansimov employs only one. Ansimov thus is lacking at least two features of the instant claims, and the Office's reliance on inherency to fill this gap is clearly misplaced. Inherency only applies when the missing information is necessarily present in the cited art. Even if there is a high probability that the beer yeast of Ansimov would be used for alcoholic fermentation, that is not enough: inherency requires absolute certainty, and, in the absence of any disclosed use for the beer yeast, the Office cannot fill the void based on conjecture. In addition, the instant claims require a second organism in addition to yeast, and, since yeast can exist and be grown without a second organism, a second organism is not necessarily – indeed it is not – present in Ansimov. Thus, the inherency based anticipation rejection fails for this reason as well. The rejection of claim 20 and 21 should be withdrawn.

Claim 39, from which claim 41 depends, is directed to a fermentation composition including two organisms: a fermentation micro-organism and at least one mineral-rich or mineral-enriched yeast. As discussed above, Ansimov discloses only one organism and does not necessarily disclose a second organism. Thus, the inherency based anticipation rejection of claims 39 and 41 should also be withdrawn.

Rejections under 35 U.S.C. § 103(a)

Claims 22-38, which depend from claim 20, stand rejected for obviousness over Ansimov. In order to establish a *prima facie* case of obviousness, the prior art references, alone or in combination, must teach or suggest all of the claim limitations (M.P.E.P. § 2143.03). As stated above, Ansimov fails to teach all of the limitations of independent claim 20. Thus, Anismov necessarily fails to teach the limitations of the dependent claims, and the rejection for obviousness should be withdrawn as well.

CONCLUSIONS

Applicant submits that the claims are in condition for allowance, and such action is respectfully requested. Enclosed is a petition to extend the period for reply for two months, to and including October 25, 2004. If there are any additional charges, or any credits, please apply them to Deposit Account No. 03-2095.

Respectfully submitted,

Date: Oct. 25, 2004

Paul T. Clark
Reg. No. 30,162

Clark & Elbing LLP
101 Federal Street
Boston, MA 02110
Telephone: 617-428-0200
Facsimile: 617-428-7045